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Eric A. Schwartz

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By ERIC A. SCHWARTZ*

Parties engaged in international commercial transactions have a number of options available to them in deciding how to resolve disputes arising in connection with those transactions. Indeed, the number of different options available—from traditional litigation in the courts to various "alternative dispute resolution" techniques—has never been greater than it is today.

The ICC International Court of Arbitration (ICC Court) was founded in 1923 by the Paris-based International Chamber of Commerce (ICC) for the specific purpose of providing for the resolution of international business disputes by means of conciliation and arbitration. During its early years, the ICC Court handled a relatively small number of cases, most of which were settled by means of conciliation. However, more recently— particularly in the last twenty years—the Court's arbitration workload has grown considerably. As of today, more than 8000 requests for arbitration have been submitted to the ICC Court, approximately two-thirds of which since 1973. At the present time, approximately 850 arbitrations are being conducted under the auspices of the ICC Court in more than thirty countries, with parties from 100 countries and arbitrators of approximately fifty different nationalities. The aggregate amount in dispute in these cases exceeds US$20 billion.

The extraordinary growth of international arbitration activity during the last few decades can be attributed primarily to the increased interdependence and accessibility of world markets and to the legislation and international conventions that have contributed to ensuring the effectiveness of arbitration agreements and the enforceability of arbitral awards. Indeed, more than 100 countries have now

* Secretary General, ICC International Court of Arbitration.

become parties to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[1] (New York Convention). As a result, arbitral awards generally enjoy more international recognition today than do the judgments of domestic courts. Moreover, in the absence of an international commercial tribunal system, arbitration offers the only truly neutral forum for the final and binding resolution of international commercial disputes.

Against this background, this article reviews the distinctive features of the arbitration system of the ICC, as well as of some of its other dispute resolution mechanisms.

I. ICC ARBITRATION

When the parties to a contract submit their disputes to arbitration, they can either select an institution to administer the arbitration or proceed *ad hoc* outside of an institutional framework. In the latter case, the arbitration will be administered by the arbitrators themselves, to the extent possible. However, if problems arise in instituting the arbitration or in forming the arbitral tribunal, the parties may require the assistance of the courts.

Unlike other institutional arbitration, ICC arbitration is unique. The differences stem from both the nature of the institution itself and from the services it provides, many of which are specifically designed for international, as opposed to domestic, proceedings.[2]

A. Distinctive Features of ICC Arbitration

1. The ICC International Court of Arbitration

The differences between the ICC and other arbitration institutions begin with the ICC Court itself. The ICC Court is not a court in the normal sense, and its members do not decide the matters submitted for arbitration. This task belongs to the arbitrators appointed under the ICC Rules of Arbitration.[3] Rather, the ICC Court is an administrative body that sets in motion and oversees arbitrations conducted under its rules.

1. United Nations Convention on the Recognition of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

2. The most comprehensive description of the ICC arbitration system is contained in W. LAWRENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION, (2d ed. 1990).

3. 28 I.L.M. 231 [hereinafter ICC Rules].

While most arbitration institutions are the products of regional or national private associations, the ICC Court is unique among international arbitration bodies in that it offers the services of a nongovernmental organization comprised of representatives from more than fifty countries. The Court's present chairman and nine vice-chairmen are from Australia, Brazil, France, Egypt, India, Japan, Senegal, Sweden, Switzerland, and the United States. In order to ensure the complete independence and neutrality of the Court, its members are all independent of the ICC, which is itself a nonprofit association with members in more than 130 countries and national committees, representing the local membership in approximately sixty countries. The national committees nominate the members of the Court, which is composed of senior lawyers, law professors, in-house counsel and other distinguished jurists. Currently, for example, the Court's members include present and former justices of the International Court of Justice, a member of the Iran-U.S. Claims Tribunal and several partners of many leading international law firms.

The Court's function, as set forth in its statutes, is "to ensure the application of the Rules of Conciliation and Arbitration of the International Chamber of Commerce."[4] In furtherance of this function, the Court—as opposed to an individual case administrator—is responsible for most of the decisions in connection with the ICC arbitration proceedings. These decisions include whether to set the arbitration in motion, whether to permit the joinder of arbitrations, designating arbitrators, reviewing and confirming the appointment of arbitrators nominated by the parties, fixing, if necessary, the place of arbitration, reviewing and deciding upon allegations of arbitrator bias or misconduct, extending time limits, scrutinizing and approving arbitral awards, and fixing the arbitrators' fees. In performing these functions, the Court draws upon the collective experience of its members—distinguished jurists from backgrounds and legal cultures as diverse as those of the participants in the arbitral process itself.

Presently, the ICC receives close to 400 new arbitration cases each year. This volume of work is such that the Court is now required to meet four times a month, once in plenary session, where all members are invited, and three times in restricted committees each consisting of three members. Pursuant to the Court's Internal Rules, the Committee is empowered to make any decision within the jurisdiction of the Court, except for decisions concerning challenges of arbitrators,

4. *Id.* app. I(3).

allegations that arbitrators are not fulfilling their functions or approval of awards other than awards of consent.[5] In addition, the chairman of the Court may make "urgent decisions" on behalf of the Court.[6] Meetings of the Court remain confidential and members having any interest or involvement, whether direct or indirect, in any matter pending before it are excluded from the proceedings. Neither parties nor arbitrators are permitted to attend sessions or make oral submissions before the Court. The Court is not required to state reasons for its decisions, nor is it the usual practice to do so.

All communications between parties, counsel and arbitrators, on the one hand, and the Court, on the other, are channelled through the Court's Secretariat. The Secretariat, in addition to assisting and advising the Court, is available to the parties, their counsel and the arbitrators for advice and assistance regarding the application of the ICC Rules and any issues that may arise in connection therewith. The Secretariat regularly communicates with, and may also meet with, parties and arbitrators to discuss matters relating to the ICC's administration of an arbitration. However, the Secretariat can in no way bind the Court with respect to decisions within the Court's competence.

The Secretariat of the Court is located at the ICC's headquarters in Paris and is presently composed of a full-time professional staff of approximately thirty persons operating under the supervision of the Secretary General. Every ICC arbitration case is assigned to a counsel and an assistant counsel within the Secretariat, who follow the matter to its conclusion and are in regular contact with the parties, their counsel and the arbitrators. It is the counsel, moreover, who will normally act as liaison between the arbitrators and the Court.

The intense level of scrutiny of the arbitral process by both the Court and its Secretariat, in addition to the international character of the institution, clearly distinguishes ICC arbitration from other forms of institutional arbitration.

It should be also noted that, even though the ICC Court meets in Paris, where its Secretariat is headquartered, ICC arbitrations may be conducted in any country, in any language, under any law and with arbitrators of any nationality.

5. ICC Rules, *supra* note 3, app. II(11).

6. ICC Rules, *supra* note 3, art. 1(3).

2. *The Scrutiny of Arbitral Awards*

Among the ICC Court's special functions, and a unique feature of ICC arbitration, is the scrutiny applied to arbitral awards by the ICC Court. Article 21 of the ICC Rules provides that the Court must approve the form of all awards and that the Court may also, without impinging on the arbitrators' autonomy, draw their attention to points of substance.[7] None of the other major arbitral institutions performs such services with respect to awards rendered under their rules of arbitration. In ICC arbitration, however, the scrutiny process is considered a key element to help ensure the highest possible quality of the arbitral awards and to minimize the likelihood of their annulment by domestic courts. This process is particularly important given the multinational composition of most ICC arbitration tribunals and the freedom accorded the parties in designating the arbitrators of their choice, as we shall see below.

Scrutiny by the Court serves a dual purpose. The first is to identify possible defects of form in the award. Such defects may include typographical or computational errors, failure to include elements that may be necessary in order to permit enforcement of the award, failure to set forth the decision in a manner capable of being executed, failure to comply with the tribunal's mandate (*e.g.*, problems of *infra* or *ultra petita*) or failure to state reasons for the award. The second purpose is to allow the Court to draw the arbitrators' attention to points of substance without affecting their autonomy in the process. Thus, while arbitrators are required to incorporate modifications of form laid down by the Court into their draft awards, they are not so obligated with respect to any points of substance raised by the Court. Generally, the Court's substantive comments concern aspects of the arbitrators' draft award that the Court may find confusing, insufficiently reasoned, contrary to provisions of applicable law or inconsistent with other parts of the award. The Court's objective in making such comments is to assist the arbitrators in producing an award that will be of the highest quality possible under the circumstances thereby increasing the likelihood that the award be accepted and carried out by the parties. The arbitrators are nevertheless solely responsible for their award and are free to disregard any substantive comments made by the Court.

Although it may be argued that the ICC's scrutiny process is unnecessary when the designated arbitrators are highly qualified, even

7. ICC Rules, *supra* note 3, art. 21.

good arbitrators can sometimes make mistakes. In 1994, approximately fifteen percent of the arbitral awards submitted to the ICC Court were not in condition for approval and were returned to the arbitral tribunal. Many others were approved only upon condition of certain modifications. The scrutiny process, therefore, is an important component of the ICC arbitral process.[8]

3. *Monitoring the Arbitral Process*

One of the ways in which the ICC Court ensures that ICC arbitrators are properly executing their duties is by monitoring the entire arbitral process, starting at the time the arbitral tribunal receives the file from the ICC.

Indeed, the ICC Rules require that, within two months from the filing date, the tribunal prepare and submit to the Court a document defining its terms of reference.[9] The terms of reference serve the purpose of bringing the arbitrators and parties together at an early stage in the proceedings to consider the issues to be addressed and the organization of the arbitration. Under Article 13 of the ICC Rules, the terms of reference must include the following particulars:

1. the full names and descriptions of the parties;
2. the addresses of the parties to which notifications or communications arising in the course of the arbitration may validly be made;
3. a summary of the parties' respective claims;
4. a definition of the issues to be determined;
5. the arbitrator's full name, description, and address;
6. the place of arbitration;
7. particulars of the relevant procedural rules and, if applicable, reference to the power conferred upon the arbitrator to act as *amiable compositeur*; and
8. such other particulars as may be required to make the arbitral award enforceable, or may be regarded as helpful by the ICC Court or the arbitrator.[10]

Normally, arbitrators draw up the terms of reference in cooperation with the parties. Usually, the tribunal will first produce a draft for party comment, and then convene a meeting for the parties to finalize and ratify the terms of reference. Under the ICC Rules, the

8. For more information concerning the scrutiny of awards by the ICC Court, see Francis E. McGovern, *Scrutiny of the Award by the ICC Court*, ICC INT'L CT. OF ARB. BULL., May 1994, at 46.

9. ICC Rules, *supra* note 3, art. 13(2).

10. ICC Rules, *supra* note 3, art. 13(1).

terms of reference are to be executed by both the arbitrators and the parties.[11] When one party refuses to ratify the terms, either because it refuses to take part in the proceedings or because it otherwise does not recognize the competence of the arbitral tribunal, the arbitration may proceed nevertheless.[12]

Although the need for terms of reference has occasionally been questioned, arbitrators and parties alike generally recognize their utility in an international setting, particularly where parties may have very different views concerning the manner in which to conduct the arbitration. Moreover, it is possible during the preparation of the terms of reference for the parties to reach agreement on outstanding issues, such as the language of the arbitration or the substantive governing law.[13] In addition, the terms of reference are particularly useful to the ICC Court in scrutinizing arbitral awards, as previously discussed.[14]

After establishing the terms of reference, the Court regularly reviews the progress of all pending cases and, in the process, considers whether any measures are needed to help ensure that the case advances expeditiously and that the proceedings are conducted in conformity with the Rules' requirements. In this regard, the staff of the Court's Secretariat maintains regular contact with both parties and the arbitrators and receives copies of all written communications and pleadings exchanged during the arbitration proceedings. Pursuant to the ICC Rules, the Court may replace arbitrators who do not fulfill their functions in accordance with the rules or within the prescribed time limits.[15]

4. Designating Arbitrators

It is commonly said that an arbitration is no better than its arbitrators, and there can be no doubt that the selection of the arbitral tribunal is one of the most critical steps in the arbitration proceeding.

The ICC Rules contemplate that the arbitral tribunal be composed of one or three arbitrators.[16] When only one arbitrator is to be

11. *Id.* art. 13(2).

12. *Id.*

13. In fact, a significant proportion of ICC arbitration cases are amicably settled during the course of, or immediately following, the preparation of the terms of reference.

14. A very helpful "Practical Guide on Terms of Reference" has been prepared by the ICC's Commission on International Arbitration. *See* ICC INT'L CT. OF ARB. BULL., May 1992, at 24.

15. ICC Rules, *supra* note 3, art. 2(11).

16. *Id.* art. 2(2).

designated, he or she is appointed by the Court, unless otherwise agreed by the parties.[17] When three arbitrators are to be designated, each party nominates an arbitrator; the third arbitrator, who acts as chairman, is appointed either pursuant to agreement of the parties or the co-arbitrators or by the Court.[18] When the parties are unable to agree on the number of arbitrators, the ICC Rules provide that the ICC Court shall appoint a sole arbitrator, "save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators."[19]

In this respect, the ICC Rules differ from certain other widely-used rules, which mandate the designation of three arbitrators unless otherwise agreed by the parties.[20] Indeed, the parties frequently do not agree, and particularly when the amount in dispute is low, designating more than one arbitrator could considerably increase the cost of arbitration and unreasonably delay the resolution of the case.[21]

With regard to the appointment of arbitrators, the ICC, unlike other arbitral institutions, is aided by ICC national committees in approximately sixty different countries which are able to assist the ICC Court in identifying potential qualified arbitrators. Unlike other institutions, the ICC does not require arbitrators to be selected from predetermined lists or panels, thus ensuring greater freedom and flexibility in forming the arbitral tribunal.

An important requirement, however, is that arbitrators be independent of the parties. Under the Rules, every prospective arbitrator is required to disclose in writing to the Secretariat of the Court "any facts or circumstances which might be of such nature as to call into question the arbitrator's independence in the eyes of the parties" and, once appointed, an arbitrator has a continuing duty to disclose any facts or circumstances of a similar nature.[22] Although the ICC Rules do not provide any guidance in determining the independence

17. *Id.* art. 2(3).

18. *Id.* art. 2(4).

19. *Id.* art. 2(5). For a discussion of the issues that may arise in constituting the tribunal when there are more than two parties to the arbitration, see Eric A. Schwartz, *Multi-Party Arbitration and the ICC—in the Wake of Dutco*, J. INT'L ARB., Sept. 1993, at 5.

20. *See* UNCITRAL Arbitration Rules, 15 I.L.M. 701.

21. In 1994, 55% of the ICC arbitration cases set in motion had three arbitrators and 45% had a sole arbitrator. The decision as to the number was left to the Court in approximately one-third of the cases brought before it, and in 75% of those cases the Court chose a sole arbitrator, primarily because of the relatively small sums of money in dispute.

22. ICC Rules, *supra* note 3, art. 2(7).

of an arbitrator, the Statement of Independence form currently in use directs prospective arbitrators to consider:

> inter *alia*, whether there exists any past or present relationship, direct or indirect, with any of the parties or any of their counsel, whether financial, professional, social or other kind, and whether the nature of any such relationship is such that disclosure is called for .... Any doubt should be resolved in favor of disclosure.

A party wishing to object to the appointment of an arbitrator on the basis of the information disclosed in the statement of independence must do so within the time limits fixed by the ICC pursuant to the Rules.[23] After such time, challenge to the appointment of an arbitrator on any other grounds must be made either within thirty days of the challenging party's receipt of notification of the appointment or of confirmation by the Court, or within thirty days from the date on which the party making such challenge became aware of the facts and circumstances upon which the challenge is based.[24] Because removing an arbitrator during the proceedings may be extremely disruptive, the Court applies a stricter standard in considering a challenge during the proceedings than it would before the arbitrator's appointment. In addition, due to the disruptive effects of replacing an arbitrator, an arbitrator may not resign from the tribunal without approval of the Court.[25]

In addition to being independent, it is critical that arbitrators conduct the proceedings diligently and expeditiously. The Rules expressly provide that arbitrators may be replaced if the Court finds they are not performing their functions "in accordance with the Rules or within the prescribed time-limits."[26]

5. *Fixing Arbitrator Remuneration*

The rules of many arbitral institutions provide that fees shall either be fixed by the arbitrators or be otherwise determined on the basis of a daily or hourly rate fixed by the institution.

Under the ICC Rules, however, the arbitrators are not compensated on the basis of an hourly or daily rate, and the arbitrators play no role in the determination of their fees. Rather, the fees are assessed by the Court at the end of the arbitration on the basis of a

23. *Id.* art. 2(8).
24. *Id.*
25. *Id.* art. 2(10).
26. *Id.* art. 2(11).

published scale appended to the rules.[27] The Court fixes arbitrators' fees according to the amount in dispute. This is intended to ensure that the arbitrators' compensation will not be disproportionate to the amount at stake in the arbitration and, thus, to promote the cost effectiveness of the process.

Each bracket of the scale, which is sharply regressive, contains both a "minimum" and a "maximum" fee (per arbitrator), and the Court has discretion to apply any figure between the "minimum" and the "maximum" in fixing the arbitrator's fees. In addition, the Court may deviate from the scale under exceptional circumstances.[28] Thus, the compensation of ICC arbitrators is not dependent solely on the amount in dispute. The Court's Internal Rules provide that, in determining the arbitrators' fees, the Court shall take into account the amount of time spent by the arbitrators, the expediency of the proceedings and the complexity of the dispute.[29] Thus the Court, rather than the arbitrators, determines whether the fees awarded constitute reasonable compensation, taking into account the manner in which the arbitration was handled and, in particular, the arbitrators' efficiency.

This system is intended to encourage the efficient handling of cases within a financial framework that is loosely related to the amount at stake in the arbitration. That the fee scale is based on the amount in dispute also discourages the submission of frivolous claims, which directly impacts the cost of arbitration. Furthermore, by means of the scale, the parties may form a general idea from the outset of the likely cost of the arbitration.

B. How the ICC Arbitration Process Works

1. Beginning the Proceedings

An ICC arbitration begins with the submission of a Request for Arbitration to the Secretariat of the ICC Court[30] accompanied by a filing fee in the amount of US$2,000. The request must include the following information:

1. full names, descriptions, and addresses of the parties;
2. a statement of the claim;

27. *Id.* art. 20(2) and app. III(5).
28. *Id.* art. 20(3).
29. *Id.* app. II(18).
30. *Id.* art. 3.

3. any relevant agreements, including any arbitration agreements and any documentation or information which will serve clearly to establish the circumstances of the case; and
4. any relevant criteria concerning the number and selection of the arbitrators.[31]

The Secretariat then forwards a copy of the request to the defendant[32] who, in turn, shall file an answer setting forth any defenses or relevant documents, as well as comments on the claimant's proposals concerning the number and selection of the arbitrators and, if appropriate, the nomination of an arbitrator.[33] Any counterclaims are to be filed together with the answer.[34]

Technically, the defendant must submit an answer within thirty days from the receipt of the request.[35] However, the defendant may apply to the Secretariat for an extension of time in exceptional circumstances.[36] The defendant is nonetheless required within thirty days to make its proposals concerning the number and selection of the arbitrators and, if necessary, to nominate an arbitrator.[37] If the defendant fails to designate an arbitrator within the specified time limit, the Court may appoint an arbitrator in its place.[38]

Beyond providing that the request shall contain "a statement of the claimant's case" and that the answer shall set out the defense, the Rules do not specify the degree of detail required. In practice, however, requests and answers are often fairly detailed. Nevertheless, parties sometimes file skeletal requests and answers that do little more than set forth the broad outlines of the claim and the defense. In such cases, the parties are usually allowed by the arbitral tribunal to file amended, more detailed pleadings. A claimant who files only a skeletal request, however, always runs the risk that the defendant will answer in considerably more detail and the arbitral tribunal's first impression of the cases will, thus, be more heavily influenced by the defendant.

In addition, the claimant in an ICC arbitration should always bear in mind that, after the arbitral tribunal has drafted the terms of reference, new claims may be disallowed. In preparing the request, the

31. *Id.* art. 3(2).
32. *Id.* art. 3(3).
33. *Id.* art. 4(1).
34. *Id.* art. 5(1).
35. *Id.* art. 4(1).
36. *Id.*
37. *Id.*
38. *Id.*

claimant should, therefore, always state its claims fully. The claimant should also be aware that, as already discussed, the ICC fixes the fees of the arbitrators (in addition to its own administrative charges) according to the amount claimed. The inflation of claims in the request or in counterclaims may have an immediate and direct effect on the cost of the arbitral proceedings.

After the initial time limit for the submission of the answer has expired, and provided that the Secretariat has obtained sufficient information concerning the parties' positions concerning such matters as the constitution of the arbitral tribunal and the place of arbitration, the matter can be submitted to the Court.

In the event of an objection by one or more of the parties, an initial matter before the Court is whether the arbitration proceedings may proceed at all and, if so, as between which parties. In this regard, the Court must satisfy itself of *prima facie* evidence of the existence of an ICC arbitration agreement between the parties.[39] In practice, the Court will verify whether an arbitration agreement might reasonably be said to exist between the parties. However, its decision is purely administrative in character. The ICC Court will not ultimately dispose of the question of the existence of an arbitration agreement; nor will it rule upon the validity of such agreement.

Assuming the Court finds there is *prima facie* evidence of an arbitration agreement, the question of the ultimate validity or existence of such an agreement and other jurisdictional questions will be left to the arbitrators, subject to subsequent review by a competent court. In this regard, the rules have incorporated the principle of "competence-competence," which has gained broad international acceptance.[40] This principle holds that the arbitral tribunal is competent to decide the question of its own competence, although its decision is subject to review by a municipal court, either at the place of the award or at the place of enforcement.[41]

It should also be noted that the ICC Rules recognize the autonomy of the arbitration agreement by providing:

> Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdic-

39. ICC Rules, *supra* note 3, arts. 7, 8(3).
40. *See* CRAIG ET AL., *supra* note 2, at 189-98.
41. UNCITRAL Model Law of 1985, art. 16, 24 I.L.M 1302.

> tion, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas.[42]

When deciding whether to commence the proceedings, the Court will normally also: (i) determine the place of arbitration or otherwise confirm the parties' agreement in this regard,[43] (ii) take appropriate steps for the constitution of the arbitral tribunal,[44] and (iii) set the amount required for the advance costs of the ICC's estimated administrative charge and the arbitral tribunal's estimated fees and expenses.[45]

2. Conducting the Proceedings

There is no standard procedure for conducting an ICC arbitration. The relevant provisions of the Rules essentially allow the parties and the arbitrators to determine how to conduct the proceedings. This basic principle is set forth in Article 11 of the Rules, which provides:

> The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.[46]

Thus, insofar as the Rules are silent, the arbitrators may apply such rules of procedure as agreed upon by the parties or determined by the arbitrators provided they do not conflict with any mandatory provisions of law applicable to the proceedings.

The Rules contain few procedural mandates. They were drafted broadly in order to allow a great deal of flexibility, given their international nature. Thus, the arbitrators have broad powers to investigate relevant facts. Neither civil- nor common-law procedural practices are mandated or favored in this regard. The Rules also grant the parties the right to a hearing if they so require.

The Rules dictate two important procedural requirements: (i) the arbitrators must draw up terms of reference within two months of receiving the arbitration file,[47] and (ii) must then render their award

42. ICC Rules, *supra* note 3, art. 8(4).
43. *Id.* art. 12.
44. *Id.* art. 2(1).
45. *Id.* art. 9(1).
46. *Id.* art. 11.
47. *Id.* art. 13(2).

within six months from the time the terms of reference became operative.[48] Although these time limits may be extended by the Court,[49] a common occurrence in complex, international disputes, they still serve as a reminder for the arbitrators and the parties of the importance of a speedy resolution.[50]

With regard to procedure, a common concern of parties to ICC arbitrations is whether the arbitrators tend to follow the procedures of any particular jurisdiction. This, of course, will depend on both the parties and the arbitrators. However, it is fair to say that there has been a considerable amount of cross-fertilization in this regard, as exemplified by the supplementary rules of evidence for use in international arbitration adopted by the International Bar Association in 1983.[51] Significant differences nevertheless exist among methods of presenting evidence in different jurisdictions, and parties in international arbitration proceedings would be well advised to familiarize themselves with the basic procedural rules with which the arbitrators and the other party are likely to be familiar.[52]

3. *The Award*

ICC arbitrators may render partial (interim) or final awards. Partial awards may be rendered with respect to preliminary issues, such as the competence of the tribunal, or may be used to dispose of different claims or counterclaims or parts thereof, such as issues of liability (as opposed to damages). In some cases, there may be advantages in obtaining partial awards. For example, a prior award on the issue of liability may permit the parties to reduce or avoid entirely the cost of proving damages. This potential benefit, however, should be weighed against the possible delay caused by interrupting the proceedings while awaiting the partial award.

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48. *Id.* art. 18(1).

49. *Id.* art. 18(2).

50. In this connection, the ICC has also assisted parties to conduct ICC arbitrations on an accelerated basis, where the parties have laid down time-limits shorter than those contained in the ICC Rules. *See* Benjamin Davis et al, *When Doctrines Meet—Fast-Track Arbitration and the ICC Experience*, J. INT'L ARB., Dec. 1993, at 69.

51. International Bar Association, *International Bar Association Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, reprinted in* D.W. Shenton, *An Introduction to the IBA Rules of Evidence*, 1 ARB. INT'L. 118, 124 (1985).

52. There is voluminous literature on procedural issues in international arbitration. For a convenient summary of many of the issues that may arise in ICC arbitration proceedings, see Blessing, *The Procedure Before the Arbitral Tribunal*, ICC INT'L CT. OF ARB. BULL., Nov. 1992, at 18.

Whether partial or final, an ICC award must conform to the following requirements:

1. It must be in writing.[53]
2. It must be signed.[54]
3. The place of arbitration must be stated.[55]
4. When three arbitrators have been appointed, it must be rendered by a majority of the arbitrators or, if there is no majority, by the chairman of the tribunal.[56]
5. The award should also specify the reasons upon which it is based, unless otherwise agreed by the parties. Although no such requirement is in the ICC Rules, many jurisdictions require that arbitral awards be reasoned, and the ICC Court usually requires it as well.[57]
6. The arbitrators must set forth the costs of the arbitration and decide what proportions are to be borne by the parties.[58]
7. A draft of the award must be scrutinized and approved by the ICC Court.[59]

Once rendered, the award is considered final and binding between the parties, who are expected to carry it out without delay.[60] The Rules further provide that the parties are deemed to have waived the right to an appeal to the extent such waiver can be made.[61] In most jurisdictions, however, this would not prevent a party from either seeking an annulment of the award or opposing its enforcement, as the waiver of such provisions may not be recognized by a court. In some countries, such as England, Switzerland, and Sweden, however, the parties may validly waive access to the courts under particular circumstances. In at least one country, Belgium, no recourse is available against an award, provided that neither party is either a Belgian national, a resident, nor has an establishment in that country.

One last comment should be made about ICC awards. Arbitration awards are generally regarded as confidential, and the ICC is

53. *Id.* art. 22.
54. *Id.*
55. *Id.*
56. *Id.* art. 19. This is an important feature of the ICC Rules, which differs, for example, from the UNCITRAL Arbitration Rules, under which the award must be made by a majority of the arbitrators. Although it is rare for a decision to be made by the chairman alone, this does occur from time to time in ICC arbitral awards, and this enables the chairman to preserve his or her complete independence with regard to the co-arbitrators nominated by the parties.
57. *Id.* app. II(17).
58. *Id.* art. 20(1).
59. *Id.* art. 21.
60. *Id.* art. 24(1).
61. *Id.* art. 24(2).

bound to preserve the confidentiality of awards and the arbitration proceedings in general.[62] Of course, this confidentiality is tempered by the availability of judicial recourse against the arbitral award and the possible need for its disclosure for legitimate purposes.[63]

C. Cost Considerations

Although arbitration is widely considered to be less expensive than litigation, there is no doubt that the process may nevertheless be expensive. In addition to the ICC's arbitral fee structure, discussed *supra*, other cost issues are worthy of mention.

The ICC has adopted procedures to help limit the financial burden of ICC arbitration on the parties and to ensure a reasonable cost for the proceedings in all cases, regardless of the amount in dispute, in the following ways.

1. Limiting the Payment that is Required to be Made to Commence the Proceedings

To initiate an ICC arbitration proceedings, the claimant must pay US$2,000 upon filing the request for arbitration, regardless of the amount of the claim. Upon receiving this sum, the ICC will proceed to notify the defendant of the request for arbitration and start forming the arbitral tribunal and attending to such other preliminary matters as may be necessary to proceed with the arbitration. Until the ICC transmits the file to the arbitral tribunal, no further payments are required. Since a substantial percentage of ICC arbitrations (approximately one-third) are amicably settled before the file is transmitted to the tribunal, no further payments are required in many ICC cases.

2. The Sharing and Staggering of the Payment of Advances on Costs

The advance on the arbitration costs is to be equally divided among the parties.[64] Although the ICC cannot enforce party compliance with the relevant ICC Rule,[65] the Rule is voluntarily adhered to in most cases. This has the effect of drastically reducing the financial burden placed on the claimant, who might otherwise have to pay the

62. *Id.* app. II(2).

63. Although arbitration is often assumed to be confidential, the related issues are, in reality, very complex. *See, e.g.*, Jan Paulsson et al., *The Trouble with Confidentiality*, ICC INT'L CT. ARB. BULL., May 1994, at 48.

64. ICC Rules, *supra* note 3, art. 9(2).

65. *Id.*

entire advance for the arbitration. The requirement that payment of the advance be shared does not, however, prejudice the arbitrators' determination regarding allocation of arbitration costs in the award.

In addition to requiring that payment of the advance be shared, the ICC permits the parties to divide the payment in two installments: the first due prior to the transmission of the file to the arbitrators and the second due prior to the terms of reference becoming operative. The parties may also substitute bank guarantees for cash payments under certain circumstances, in particular, when one party has not paid its share of the advance or when the amount exceeds US$300,000.

There are other ways in which the parties can control the cost of an ICC arbitration. Indeed, the control of such costs begins during the drafting of the arbitration clause, well before the commencement of the proceedings. If poor drafting forces the parties into a battle over the proper construction of the clause, costs accumulate significantly.[66]

Also, any agreement between the parties with respect to the place of arbitration and the number of arbitrators may have a substantial impact on the cost of arbitration. Choices made with respect to the law governing the arbitration may also have consequences, particularly if it becomes necessary, as a result, to obtain expert advice about laws with which a party's usual counsel is not familiar.

Once an arbitration proceeding has commenced, parties should always consider the cost-effectiveness of the positions they adopt concerning matters of both substance and procedure. Cost control in arbitration, therefore, depends primarily upon the parties and their advisers assessing the relative costs and benefits of time and other resources to be devoted to a case and procedures to be followed. One of the advantages of the arbitration process is that it offers the parties a great deal of flexibility in this regard. Moreover, the arbitrators are required to render an award reflecting the parties' costs, including

66. The ICC has published a standard, recommended clause that provides: All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. Standard ICC Arbitration Clause, 28 I.L.M. 231, 234. Parties are also reminded that it may be desirable for them to add to the clause an indication concerning the law governing the contract, the place and language of the arbitration and the number of arbitrators, although great care should be taken with respect to the latter, particularly if the likely size of the disputes that may subsequently arise is uncertain. Special provisions may also have to be drafted to deal with multi-party situations. *See* Schwartz, *supra* note 19.

their legal costs.[67] ICC arbitrators make liberal use of these powers, and as a result, the cost of the arbitration to the prevailing party may be substantially reduced.

II. OTHER DISPUTE RESOLUTION MECHANISMS

A. *ICC Conciliation*[68]

Along with its arbitration system, the ICC maintains a system for resolution of disputes by conciliation.

Although the ICC rules of optional conciliation[69] went into effect on January 1, 1988, they have been used infrequently in recent years in contrast with the dramatic growth in the ICC's arbitration caseload. This remains true, notwithstanding the growing interest in alternative dispute resolution (ADR) techniques other than arbitration. Indeed, in Europe, organized conciliation has not really taken hold, unlike in the United States and some other jurisdictions.

The first and possibly most significant feature of the Conciliation Rules is that they do not define the term "conciliation" or what precisely an ICC conciliator is required to do. Although the Rules envisage the conciliator putting forward settlement proposals, which the parties are free to accept or reject, the conciliator is not required to do so. How the conciliator conducts the conciliation and whether or not he makes any recommendations to the parties are matters left entirely to the conciliator's discretion. "Conciliation" under the Conciliation Rules can therefore conceivably embrace any process where a neutral third party assists parties to settle a dispute amicably.

As a consequence, no particular significance need be attached to the use of the word "conciliation," as opposed to, for example, "mediation." Although "conciliation" and "mediation" are often distinguished, the Conciliation Rules are drafted so broadly that they permit an ICC conciliator to "conciliate" or "mediate," regardless of the meaning attached to those terms.

Given the broad discretion given to the conciliator in fashioning procedures, ICC conciliation can best be described by stating what it is not (*i.e.*, a process leading to a binding adjudication or an award).

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67. ICC Rules, *supra* note 3, art. 20.

68. The following discussion has been adapted from a lengthier examination of the ICC conciliation process in Eric A. Schwartz, *International Conciliation and the ICC*, ICC INT'L CT. ARB. BULL., Nov. 1994, at 5.

69. 28 I.L.M. 231, 234 [hereinafter Conciliation Rules].

Rather, it is a process leading, hopefully, to a settlement agreement by which the parties are bound.

A key feature of the ICC conciliation process, therefore, is that it is entirely voluntary from beginning to end. All of the parties concerned must agree to participate in the attempted conciliation, and parties may terminate the process at any time without stating a reason.[70] This would be the case even if the parties had agreed to conciliation prior to the dispute, which is why the ICC has not recommended a separate conciliation clause in addition to the ICC arbitration clause. Given the nonbinding and voluntary nature of the conciliation process, the drafters of the Conciliation Rules sought to ensure that the Rules would be both simple and flexible, would protect the confidentiality of all views expressed or proposals made with respect to the possible settlement of the dispute in question, and would allow the process to be conducted expeditiously and at the lowest possible cost.

1. Simplicity

First of all, the Rules are extremely concise, consisting of only eleven articles. An ICC conciliation proceeding begins with submission to the Secretariat of a conciliation application (together with a payment of US$500).[71] The application is required to set out "succinctly" the purpose of the request.[72] However, no particular documents or other information are required, as in the case of arbitrations.

As already stated, previous agreement between the parties is not required. Rather, the conciliation is set in motion if the other party agrees to participate within fifteen days of notification of the conciliation request.[73]

If the parties agree to attempt conciliation, the Secretary General will appoint a conciliator.[74] In contrast with an ICC arbitration, the Court is not involved in the process. Thus, the Secretary General not only designates the conciliator but also fixes the conciliator's compensation and the administrative charge.[75] The Rules further provide for a sole conciliator,[76] although they do not exclude the possible appointment of more than one conciliator should the parties so desire. The

70. *Id.* art. 7(c).
71. *Id.* art. 2.
72. *Id.*
73. *Id.* art. 3.
74. *Id.* art. 4.
75. *Id.* art. 9.
76. *Id.* art. 1.

Rules do not impose any conditions or requirements on the appointment of the conciliator. Once appointed, the conciliator may conduct the proceedings as he or she sees fit.[77]

2. Flexibility

Apart from the requirement that the conciliator be "guided by the principles of impartiality, equity and justice,"[78] the Conciliation Rules do not place any particular constraints on either the conciliator or the parties.

The Rules do not require the conciliator to meet or communicate with the parties, as would normally occur in an arbitration proceeding. The conciliator is therefore free, if appropriate under the circumstances, to meet separately with the parties and to serve as an intermediary. The conciliator is also not required (as, for example, under the UNCITRAL conciliation rules) to disclose to one party information obtained from another party during the conciliation process. Apart from the initial application to conciliate, there is no requirement that submissions be made in writing. Likewise, the conciliator is not required to make settlement proposals to the parties. The proceedings may be commenced or terminated at any time by either party. There is no restriction on a party's right to initiate a conciliation concurrently with arbitral or judicial proceedings.

3. Confidentiality

The drafters of the Conciliation Rules assumed that, before agreeing to participate in a conciliation proceeding, parties may want to ensure against prejudicing their positions in the event the conciliation is unsuccessful and subsequent arbitration or judicial proceedings are instituted. Therefore, the Conciliation Rules provide that:

> The confidential nature of the conciliation process shall be respected by every person who is involved in it in whatever capacity.[79]

The confidentiality of any agreement reached by the parties during the conciliation is expressly protected by both Article 7[80] and Article 11. Article 11 provides that:

77. *Id.* art. 5.
78. *Id.*
79. *Id.* art. 6.
80. "The agreement shall remain confidential unless and to the extent that its execution or application require disclosure." *Id.* art. 7(a).

> The parties agree not to introduce in any judicial or arbitration proceeding as evidence or in any manner whatsoever:
>
> a) any views expressed or suggestions made by any party with regard to the possible settlement of the dispute;
>
> b) any proposals put forward by the conciliator;
>
> c) the fact that a party had indicated that it was ready to accept some proposal for a settlement put forward by the conciliator.[81]

The Conciliation Rules also prohibit the conciliator from acting "in any judicial or arbitration proceeding relating to the dispute which has been the subject of the conciliation process whether as an arbitrator, representative or counsel of a party" or as a witness, unless the parties otherwise agree.[82] The Conciliation Rules therefore clearly envisage complete separation of the conciliation and arbitration processes, unless the parties otherwise agree. This is in contrast with ADR schemes where the conciliator (or mediator) would carry on as an arbitrator if the conciliation (or mediation) attempt were to fail. Moreover, the ICC Rules of Arbitration do not contain any provision allowing conciliation during the ICC arbitral process, unlike under regimes where conciliation may be integrated into the arbitral process.[83]

It should also be noted that the provisions on confidentiality relate only to the conciliation process itself; thus they do not bar any reference, in a subsequent arbitration or judicial proceeding, to the fact that conciliation may have been requested by one party but refused by the other. Nor does Article 11 expressly bar the introduction in subsequent judicial or arbitration proceedings of evidence presented during a conciliation.[84]

In any event, the confidentiality protections set forth in the conciliation rules are much more extensive than those contained in the ICC Rules of Arbitration.

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81. *Id.* art. 11.

82. *Id.* art. 10.

83. Thus, for example, Article 46 of the Arbitration Rules of the China International Economic and Trade Arbitration Commission expressly provides that an arbitration tribunal may conciliate cases "under its cognizance in the process of arbitration" if the parties so desire. Section 2B of the Hong Kong Arbitration Ordinance also expressly enables an arbitrator to act as a conciliator if both parties agree in writing. Although there is no similar provision in the ICC Rules of Arbitration, it is not, in fact, unusual for arbitrators, to assist parties in settling their disputes where this is requested.

84. Evidentiary submissions may arguably be protected, however, by the general confidentiality rule set forth in Article 6.

4. Time and cost

The Conciliation Rules do not establish time limits for the conciliation once the parties have agreed to attempt to conciliate. However, they do require the conciliator to "set a time limit for the parties to present their respective arguments."[85] The conciliator is thus in a position to conduct the conciliation as swiftly as possible under the circumstances of the case. Unlike ICC arbitration, the process is not delayed by the Court's need for intervention since the Court is not involved in the administration of the Conciliation Rules.

The costs of ICC conciliations are also intended to be substantially lower than those of ICC arbitration. The schedule of conciliation and arbitration costs appended to the ICC Rules provides that the ICC administrative expenses for a conciliation procedure shall be fixed at one-quarter of the amount applicable in an arbitration.[86] The fee of the conciliator is fixed by the Secretary General of the ICC Court in a "reasonable amount, taking into consideration the time spent, the complexity of the dispute and any other relevant circumstances."[87] The Secretary General is therefore not bound, as is the ICC Court (other than in exceptional circumstances), to apply a fee scale established according to the amount in dispute, although he may reasonably be expected to consider that scale in determining the conciliator's fees.

Article 9 of the Conciliation Rules provides that, upon the conciliation file being opened, the Secretariat of the Court shall fix an advance, to be paid by the parties in equal shares, which is intended to cover the estimated fees of the conciliator, the expenses of the conciliation and the ICC's administrative charges.[88] The final cost of the conciliation is determined, however, only upon termination of the conciliation.[89] Therefore, unless the parties otherwise agree, acceptance by the parties of an attempt to conciliate implies their agreement to bear jointly the costs of the proceedings.

5. The Conciliation Rules in Practice

During the seven-year period between January 1, 1988, when the current version of the Conciliation Rules entered into force, and De-

85. Conciliation Rules, *supra* note 69, art. 4.
86. ICC Rules, *supra* note 3, app. III(1).
87. ICC Rules, *supra* note 3, app. III(1)(b).
88. Conciliation Rules, *supra* note 69, art. 9.
89. *Id.*

cember 31, 1994, the ICC received sixty requests for conciliation, and out of that relatively small number, an agreement to attempt conciliation was reached in seventeen cases. Of those seventeen cases, however, only eleven actually moved forward (two are still pending). Five of the other six cases were withdrawn, four of them by the party who initiated the procedure before the appointment of a conciliator. The sixth case was settled by the parties directly without recourse to the appointed conciliator.

Of the nine cases that actually proceeded and have come to completion, five resulted in settlement agreements, one was converted into an arbitration (which is still pending) after the settlement of some issues, and three failed completely.[90] Eight of the ten parties in the five successful cases were European (three Swiss, two French, one Spanish, one Italian and one from Monaco), one was from the United States and one was from Argentina. None of those parties was a governmental entity, although a public authority (from Asia) was a participant in the conciliation that turned into an arbitration. State trading organizations from Central European countries were also parties in two of the three unsuccessful conciliations. (The other parties in those cases, however, were either Western European or American.)

In general, therefore, the users of the Conciliation Rules have been Western European private companies in connection with disputes arising under contracts with other Western European companies. Thus the participants in the process constitute a much less diverse group than the users of ICC arbitration. With regard to the amount in dispute, all of the successful conciliations involved relatively modest sums, ranging from less than US$10,000 in one case to US$2.6 million in another.

Although little use has been made of the Conciliation Rules in recent years, it follows from their successful application that there is a role for conciliation in the resolution of international commercial disputes, albeit in a small number of cases. Although conciliation is neither possible nor appropriate in all circumstances, I suspect that it could be attempted more often than it is presently.

In cases involving limited amounts in dispute, parties need to weigh very carefully the relative advantages and disadvantages of conciliation as opposed to arbitration. Still, at present, the ICC receives many arbitration requests involving relatively small sums of money.

90. In none of those three cases, however, was the dispute subsequently referred to arbitration or to the courts, to the ICC's knowledge.

In 1994, ninety-nine ICC arbitrations were commenced for claims under US$500,000, and, of those, forty-one were for sums less than US$200,000. Provided, of course, that the parties act in good faith and wish to resolve their dispute, conciliation is an option that should be seriously considered in such cases.

B. International Centre for Expertise

As many disputes may turn on primarily technical issues, the ICC established an International Centre for Expertise in 1976 to complement the services offered by the ICC.

The main purpose of the Centre is to indicate or appoint neutral experts to assist in the resolution of disputes by reporting on technical issues dividing the parties. Such an expert report is to be distinguished from an arbitral award, and it will not bind the parties unless agreed otherwise. Experts are consulted primarily in the context of civil engineering and construction contracts,[91] but may also be helpful in a variety of financial, high-tech, industrial and commercial matters.

Appointments are made on behalf of the Centre by the chairman of a standing committee after consultation with its members. The standing committee is composed by five members of different nationalities all appointed by the ICC. Its present members are American, English, French, Japanese and Swiss.

Any request for the proposal or appointment of an expert must be accompanied by a payment of US$1,000, which is credited against the Centre's administrative costs. In no case can the amount exceed fifteen percent of the expert's fees. The amount of those fees is determined by the Centre on the basis of the expert's field of expertise, qualifications, and the nature of his or her services.

Over the last several years, the Centre has received approximately ten requests for proposals or appointments a year, primarily in the construction field. This is a surprisingly small number in view of the number of disputes submitted to ICC arbitration involving technical issues. Even though an expert report may not have the finality of an arbitral award, the report of a neutral third party respected by the parties could help resolve many disputes that are currently being submitted for arbitration.

91. In this regard, the Engineering Advancement Association of Japan, in its Model Form International Contract for Process Plant Construction, has provided for recourse to the Centre for the appointment of an expert in respect of relevant disputes, without prejudice, however, to possible recourse to arbitration thereafter.

C. Pre-Arbitral Referee Procedure

A further mechanism introduced by the ICC deserves to be mentioned: The ICC's pre-arbitral referee procedure,[92] modeled after the French referee judge procedure, which went into force on January 1, 1990.

The pre-arbitral referee procedure was developed to provide for interim relief to the parties to an international commercial contract before an arbitral tribunal may be formed. In this context, the ICC Arbitration Rules provide that the parties are free, before the file is transmitted to the arbitral tribunal, "to apply to any competent judicial authority for interim or conservatory measures" without infringing the agreement to arbitrate.[93]

The Referee Rules provide that a referee may be appointed by either the parties or the chairman of the ICC Court, with authority to order:

> (a) any conservatory measures or any measures of restoration that are immediately necessary to prevent either damage or irreparable loss and to safeguard any of the rights or property of the parties;
> (b) a party to make a payment to any other party or to another person;
> (c) a party to take any steps to be taken according to a contract between the parties, including the signing or delivery of a document or the procuring by a party of the signature or delivery of a document; and
> (d) any measures necessary to preserve or establish evidence.[94]

Pursuant to Article 2(4) of the Referee Rules, the referee shall retain the power to grant interim relief notwithstanding the transmission of the case to an arbitrator, unless the parties or the arbitrator otherwise provide.[95]

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92. ICC Rules for a Pre-Arbitral Procedure, International Chamber of Commerce, *Rules for a Pre-Arbitral Referee Procedure, reprinted in* 1 AM. REV. INT'L ARB. 402 (1990) [hereinafter Referee Rules].

93. ICC Rules, *supra* note 3, art. 8(5). Although courts in the United States have taken differing views concerning the availability of court-ordered provisional remedies when the parties have agreed to arbitration, courts outside the United States have generally accepted to grant interim or conservatory relief affecting parties or assets within their jurisdiction, as permitted under the ICC Rules. For a general discussion of this topic, see THE ICC INTERNATIONAL COURT OF ARBITRATION, CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION (1993).

94. Referee Rules, *supra* note 91, art. 2(1).

95. *Id.* art. 2(4).

Enforcement of the referee's orders, however, depends primarily on the parties' goodwill. Article 6(6) of the Referee Rules provides that the "parties agree to carry out the referee's order without delay."[96] The Rules nevertheless provide for certain means of encouraging compliance. For example, noncompliance with a referee's order is sanctionable by the competent jurisdiction,[97] although court enforcement of such an order may be problematic if it is not regarded as an arbitral "award."

As of today, there have been no requests to the ICC for the appointment of a referee. A novel proposal for the use of the referee procedure is, however, contained in a proposed form of performance guarantee for international construction contracts issued by the International Bar Association.[98]

It, therefore, remains to be seen what, if any, success the pre-arbitral referee procedure may ultimately have in practice.

96. *Id.* art. 6(6).
97. *Id.* art. 6(8)(1).
98. James J. Meyers et. al., *Illustrative Forms of Performance Guarantee and Counter-Guarantee for International Construction Projects*, 20 INT'L BUS. LAW. 243 (1992).